(3)

No. 94-385

Supreme Court, U.S.
FILED
SEP 13 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

EXXON CORPORATION, *et al.*,
Petitioners,

v.

EYAK NATIVE VILLAGE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

JOINT BRIEF IN OPPOSITION

DAVID W. OESTING
DAVIS WRIGHT TREMAINE
550 West Seventh Avenue
Suite 1450
Anchorage, AK 99501
(907) 257-5300

JERRY S. COHEN
COHEN MILSTEIN HAUSFELD
& TOLL
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-4600

Co-Lead Counsel For Plaintiffs-Appellants

JAMES VANR. SPRINGER
(Counsel of Record)
DICKSTEIN, SHAPIRO &
MORIN, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

September 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, under the particular circumstances of this complex litigation, this Court should disturb the court of appeals' decision that notices of removal of certain cases from state court were untimely for the same reason as earlier notices of removal of other consolidated cases, where the later removals were premised upon the same Preliminary Designation of issues for trial as the earlier removals, where petitioners' brief agreed that the court of appeals' decision as to the earlier removals "will govern the outcome as to [the later removals]," and where petitioners do not challenge the court of appeals' decision as to the earlier removals.

TABLE OF CONTENTS

	Page
STATEMENT	1
REASONS FOR DENYING THE PETITION	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases: Page

Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) 5
Maniar v. FDIC, 979 F.2d 782 (9th Cir. 1992) 7
United States Nat. Bank v. Independent Ins. Agents of America, Inc., 113 S. Ct. 2173 (1993) 7
Youakim v. Miller, 425 U.S. 231 (1976) 5

Statutes:

28 U.S.C. § 1441(c) 2
28 U.S.C. § 1446(b) 6
28 U.S.C. § 1447(c) 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-385

EXXON CORPORATION, *et al.*,
Petitioners,

v.

EYAK NATIVE VILLAGE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

JOINT BRIEF IN OPPOSITION

This Brief in Opposition is submitted on behalf of all plaintiffs in the Alaska *EXXON VALDEZ* litigation affected by the three removal orders (district court Orders Nos. 91, 92 and 108) the reversal of which by the court of appeals is the subject of Exxon's Petition for a writ of certiorari. To the best of our knowledge, these respondents are correctly listed in Appendix E to the Petition.[1]

STATEMENT

Although Exxon's argumentative statement of the purported grounds for removal of the cases in issue is distorted, it requires no response because it is irrelevant to the extremely narrow question of timeliness raised by the Petition. Somewhat more explanation of the context in

---

[1] Those respondents which are corporations have no parent companies or subsidiaries other than wholly owned subsidiaries.

which Orders Nos. 91, 92 and 108 arose and were reviewed by the court of appeals is, however, necessary.

More than two and one-half years into the litigation arising out of the March 1989 EXXON VALDEZ oil spill, Exxon and the other defendants began to remove the large number of cases pending in Alaska Superior Court under several theories, all of which the district court accepted in substance. The first group of cases was removed on an intricate and novel theory which was adopted in the district court's Order No. 80 and affirmed by the court of appeals (Pet. App. 5a-20a). Exxon correctly states that Order No. 80 "is not involved in any way in this Petition" (Pet. 5).[2]

Other cases were subsequently removed on the entirely separate theory—adopted in the district court's Order No. 83 (Pet. App. 26a) but not reached by the court of appeals because it found this second batch of removals untimely—that plaintiffs' reference to oil tanker safety

[2] The theory of Order No. 80 rested on the propositions (1) that certain cases brought by environmental plaintiffs became federal question cases when those plaintiffs continued to pursue them after a consent decree settled separate governmental environmental claims and (2) that certain other cases in which fishermen and others sought economic damages then became derivatively removable under 28 U.S.C. § 1441(c) because they were consolidated with the environmental cases. Plaintiffs adversely affected by the court of appeals' affirmance of Order No. 80—who are distinct from the respondents here—have not yet decided whether they will seek certiorari to review the distinct issues of *substantive removal law* raised by that affirmance. Any such petition would be due on October 11, 1994. Since Exxon's Petition is unconnected in any way to Order No. 80—raising as it does only an issue of *removal procedure* involving different cases—there is no reason for this Court to defer its disposition of Exxon's Petition. As the court of appeals' opinion reflects, these are both literally and practically separate appeals. The present respondents' clear right to proceed in state court now should not be held up pending any determination of the right of other plaintiffs in other cases, removed on a wholly separate theory, to return to state court at a later time.

standards in their joint Preliminary Designation of issues for trial federalized the cases because it amounted to an attack upon a 1978 federal court injunction prohibiting the State of Alaska from enforcing some such standards. The court of appeals' reversal of Order No. 83 was based on the ground that the Preliminary Designation did not raise any new claim that had not been in the litigation for many months (Pet. App. 21a-25a). Exxon's Petition also does not challenge this aspect of the decision below. See Pet. 5.

The three cases in issue here were filed after the removal of the cases covered by Order No. 83. The district court's Orders Nos. 91, 92 and 108 (Pet. App. 50a, 54a, 58a) held, respectively, that each of these cases was given a federal character by the same Preliminary Designation of trial issues relied on in Order No. 83 and was properly removed because the new plaintiffs did not take affirmative steps to disown that previous filing by other plaintiffs. None of these Orders purported to find anything in any of the three complaints, or in any filing thereafter, which stated any federal question. Like Order No. 83, Orders Nos. 91, 92 and 108 were reversed by the court of appeals on the ground that the removals were untimely because the Preliminary Designation did not trigger removability. Pet. App. 21a-25a. Exxon's Petition is limited to this holding that the removals covered by Orders Nos. 91, 92 and 108 were untimely.

Contrary to Exxon's suggestion that the issue of the timeliness of these removals sprouted spontaneously in the minds of the court of appeals panel after argument, timeliness was specifically addressed by the district court in Order No. 91 (Pet. App. 53a).[3] Respondents argued in the court of appeals that "the Alyeska removals [*i.e.*, those covered by Orders Nos. 83, 91, 92 and 108] were

---

[3] The timeliness of the removals was not addressed in Orders Nos. 92 and 108.

untimely" (Brief for Plaintiffs-Appellants 27-30)[4] and that Orders Nos. 91, 92 and 108 "should be reversed for the same reasons as Order No. 83" (*id.* at n. 19). In specific response to this latter argument, the Joint Brief for Defendants and Appellees made the following statement at the outset:

> "This appeal involves five orders of the district court denying remand of certain cases to the Alaska Superior Court. Only two orders (Order 80, P.C.R. 2619, and Order 83, P.C.R. 2710) need be considered to decide the appeal. Defendants agree with plaintiffs that the outcome as to Order 83 will govern the outcome as to Orders 91, 92, and 108 (P.C.R. 2829, 2847, and 3081)."

Id. at 2. That is, of course, precisely the approach taken by the court of appeals in reversing Orders No. 91, 92 and 108 on the same ground as Order No. 83. Now, however, Exxon asks this Court to determine that the court of appeals erred as to Orders Nos. 91, 92 and 108, while in effect conceding (by not petitioning) that the court of appeals was correct as to Order No. 83.

---

[4] Additionally, the Brief for Plaintiffs-Appellants identified one of the three "issues presented for review" as follows: "Has the district court committed error in holding the removal notices timely notwithstanding that defendants were on notice of the purported federal questions upon which removal was based more than 30 days before the notices were filed?" *Id.* at 3.

REASONS FOR DENYING THE PETITION

1. Having explicitly advised the court of appeals of its agreement that a reversal of Order No. 83 would automatically "govern the outcome as to Orders 91, 92, and 108," Exxon has waived any right to argue that the court of appeals erred in not distinguishing between Order No. 83 and the others. But that is exactly what the Petition would do. Exxon's effort to evade the explicit language of its brief below (Pet. 8 n.5) is patently spurious.[5] Where both parties have agreed upon the formulation of the issue to be decided by an appellate court, they are ordinarily bound by that formulation. *See Dick v. New York Life Ins. Co.*, 359 U.S. 437, 445 (1959). It is a settled principle of this Court's jurisprudence that

> "Ordinarily this Court does not decide questions not raised or resolved in the lower court. . . . 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed on below are reviewed.' "

Youakim v. Miller, 425 U.S. 231, 234 (1976) (citations omitted). Exxon cannot now ask this Court to draw a distinction among the removals that it expressly disavowed below.

2. Even if Exxon were free to take issue as to the timeliness of the three removal notices that are the subject of its Petition, the questions it purports to present fall far short of Rule 10's certiorari criteria.

(a) Exxon's first contention—that it was improperly denied an unconditional right, plain on the face of 28

---

[5] In attempting to limit its concession below, Exxon fails to acknowledge that the language at page 14 of the Brief for Plaintiffs-Appellants which Exxon claims set the context for its concession included a specific reference to "plaintiffs' argument that Alyeska's removal was untimely." Thus, there is no basis whatever for Exxon's post-hoc effort to escape its own precise formulation of the issues in the court of appeals.

U.S.C. § 1446(b), to remove these three cases within 30 days after the filing of the complaints—raises no question warranting this Court's consideration. If the situation were as simple and clear-cut as Exxon contends there would be no jurisprudential need for this Court to say so. However, the situation is not as Exxon claims, both because of its concession below and because of the unusual circumstances of these particular removals. These removals were based not on anything in the complaints, but rather solely upon the dubious proposition that the new state court plaintiffs were bound by the Preliminary Designation of issues for trial filed by other plaintiffs in other cases which had already been removed. If removal based on the Preliminary Designation was untimely in the cases covered by Order No. 83—as Exxon now accepts by not challenging the reversal of that Order—it was entirely reasonable to hold that any other removal based solely upon that same filing was equally untimely.[6] In any event, the particular circumstances surrounding these removals are so unique and unlikely to recur that no issue of any general importance could be raised.

(b) Exxon's second point—that the Court of Appeals was powerless to require remand on a ground not stated *in haec verba* in the motions denied by Orders Nos. 91, 92 and 108—would be no more deserving of this Court's consideration even if Exxon's concession below did not bar Exxon from raising it.[7] Exxon does not dispute the fact that the plaintiffs in each of these three cases did file motions to remand, and it does not challenge the timeliness of those motions under 28 U.S.C. § 1447(c). The district court expressly discussed the issue of the timeliness of the removal notice in Order No. 91. Contrary to

---

[6] As previously noted, Exxon has never claimed that anything appearing in the complaints made the cases removable.

[7] Moreover Exxon never raised this second point before the court of appeals; its petition for rehearing as to Orders Nos. 91, 92 and 108 was limited to the first question presented in the Petition.

the assertions in the Petition, respondents' brief in the court of appeals did challenge the timeliness of these three removal notices. See pp. 3-4, *supra*. In any event, it is fundamental that

> " '[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law' . . . ."

United States Nat. Bank v. Independent Ins. Agents of America, Inc., 113 S. Ct. 2173, 2178 (1993) (citation omitted). No case cited by Exxon holds or suggests that a court cannot grant a timely motion for remand on any proper ground, whether or not that ground was specifically articulated in the motion. The cases cited at pages 10-11 of the Petition stand for nothing more than the very different proposition that a removed action may not be remanded on procedural grounds when no motion at all has been filed pursuant to § 1447(c). Thus, there is no conflict among the circuits.[8]

---

[8] Indeed, as the Petition notes, the Ninth Circuit has expressly agreed with this different proposition in *Maniar v. FDIC*, 979 F.2d 782, 786 (9th Cir. 1992). Thus, if the purported conflict existed it would be an intra-circuit conflict to be resolved by the Ninth Circuit *en banc*. Exxon did not, however, request any such *en banc* consideration.

CONCLUSION

The questions that the Petition purports to present are extremely narrow and arise in a unique context that is unlikely to recur and involves no conflict with any other court of appeals. Moreover, petitioner's brief below waived any right to challenge the court of appeals' decision on these grounds. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID W. OESTING
DAVIS WRIGHT TREMAINE
550 West Seventh Avenue
Suite 1450
Anchorage, AK 99501
(907) 257-5300

JERRY S. COHEN
COHEN MILSTEIN HAUSFELD
& TOLL
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
(202) 408-4600

Co-Lead Counsel For Plaintiffs-Appellants

JAMES VANR. SPRINGER
(Counsel of Record)
DICKSTEIN, SHAPIRO &
MORIN, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

September 1994